Nos. 06-487, 06-503

IN THE

Supreme Court of the United States

JEFFERDS CORPORATION and
CROWN EQUIPMENT CORPORATION,
Petitioners,

v.

JEREMIAH "BART" MORRIS,
Respondent.

On Petition for a Writ of Certiorari to the
West Virginia Supreme Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

ALLISON M. ZIEVE
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

JOHN COOPER
Counsel of Record
Cooper, Preston & Douglas
333 2nd Street
Parsons, WV 26287
(304) 478-4600

Counsel for Respondent

November 2006

QUESTION PRESENTED

Whether West Virginia's venue statute, W. Va. Code § 56-1-1, requires a West Virginia state court to decline to exercise jurisdiction over a case brought by a non-resident plaintiff against a West Virginia resident.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

A. This Court Lacks Jurisdiction To Review The Non-Final Decision Below 3

B. The West Virginia Supreme Court Of Appeals Articulated Independent State Grounds For Its Decision 6

C. No Conflict Exists Among The State High Courts On The Issue Decided Below 6

1. Petitioners' reliance on forum non conveniens cases is misplaced 7

2. The cases Petitioners cite involving venue statutes do not conflict with the judgment below 10

D. The Decision Below Is Consistent With Supreme Court Jurisprudence 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES Pages

Baltimore & Ohio Railroad Co. v. Ballie,
148 N.E. 233 (Ohio 1925) 11

Belknap v. Hale,
463 U.S. 491 (1983) 5

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 3, 4, 5

Douglas v. New York, New Haven & Hartford Railroad Co.,
279 U.S. 377 (1929) 11, 12

Flynt v. Ohio,
451 U.S. 619 (1981) 5

Gober v. Federal Life Insurance Co.,
237 N.W. 32 (Mich. 1931) 10

Gore v. United States Steel Corp.,
104 A.2d 670 (N.J. 1954) 7, 9

Grovey v. Washington National Insurance Co.,
119 S.W.2d 503 (Ark. 1938) 9

Harvey v. Eastman Kodak Co.,
610 S.W.2d 582 (Ark. 1981) 9

Jefferson v. City of Tarrant,
522 U.S. 75 (1997) 3, 4

Loftus v. Pennsylvania Railroad Co.,
140 N.E. 94 (Ohio 1923) 10

Missouri ex rel. Southern Railway Co. v. Mayfield,
340 U.S. 1 (1950) 12

Mooney v. Denver & Rio Grande Western Railroad Co.,
221 P.2d 628 (Utah 1950) 7

Owens Corning v. Carter,
997 S.W.2d 560 (Tex. 1999) 11

Rosenthal v. Unarco Industries,
297 S.E.2d 638 (S.C. 1982) 10

Southland Corp. v. Keating,
465 U.S. 1 (1984) 5

Walker v. Ohio River Co.,
205 A.2d 43 (Pa. 1964) 9

Westerby v. Johns-Manville Corp.,
32 Pa. D. & C.3d 164 (Pa. Com. Pl. 1982) 9

STATUTES

28 U.S.C. § 1257(a) 3

W. Va. Code § 56-1-1(a) 1, 2, 5, 6

W. Va. Code § 56-1-1(c) 1, 2, 4, 5, 6, 10

STATEMENT OF THE CASE

While operating a forklift that went out of control, respondent Jeremiah "Bart" Morris suffered a severe injury that required amputation of his leg. Mr. Morris is a Virginia resident, and the incident occurred in Virginia.

Petitioner Jefferds Corporation ("Jefferds"), a West Virginia Corporation, is the distributor of the forklift and responsible for servicing the product. Petitioner Crown Equipment Company ("Crown"), an Ohio corporation, designed, manufactured, and distributed the forklift. Mr. Morris sued Petitioners in state court in West Virginia, where Jefferds is incorporated and has its principal place of business and where its officers reside. The complaint alleges negligence, strict liability, failure to warn, and breach of warranty.

Both Jefferds and Crown moved to dismiss for improper venue based on a West Virginia statute, W. Va. Code § 56-1-1(c) (2003), which, in pertinent part, provides: "[A] nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."

In response to the motions to dismiss, Mr. Morris argued that application of § 56-1-1(c) as urged by Petitioners would violate the Privileges and Immunities Clause of the United States Constitution, that their argument ran counter to the Open Courts Clause of the West Virginia Constitution, that venue was proper under W. Va. Code § 56-1-1(a) because Jefferds is a West Virginia corporation, and that venue was proper under § 56-1-1(c) because "a substantial part of the acts or omissions giving rise to the claim asserted occurred in" West Virginia. Mr. Morris also moved to amend his complaint and to take discovery limited to venue issues.

The trial court denied Mr. Morris's motions and granted Petitioners' motions to dismiss. Mr. Morris appealed to the

state Supreme Court of Appeals, which reversed and remanded the case to the trial court for proceedings on the merits. The court explained that a reading of W. Va. Code § 56-1-1(c) that "categorically immunize[d] a West Virginia defendant . . . from suit in West Virginia by a nonresident" would run afoul of the Privileges and Immunities Clause and "established West Virginia law." Jefferds App. 19. The court therefore gave a "narrow-breadth reading" to the state statute and held that § 56-1-1-(c) does not apply to civil actions filed against West Virginia citizens and residents, such as Jefferds. *Id.* 20-21. The court therefore did not reach the state constitutional issue. The court also did not decide whether "a substantial part of the acts or omissions involved" occurred in West Virginia, although the majority stated that "it seems clear that the plaintiff's Second Amended Complaint does sufficiently allege that a 'substantial' portion of the acts or omissions giving rise to Morris' claims occurred in West Virginia." *Id.* 11-12.[1]

In a concurrence, Justice Benjamin stated that the case should be remanded to resolve factual questions about "whether 'all or a substantial part of the acts or omissions giving rise to the claim occurred in'" West Virginia. *Id.* 31 (quoting § 56-1-19(c)); *see id.* 35 (same). He also stated that venue was proper under W. Va. Code § 56-1-1(a), based on the residence of Jefferds's officers. *Id.* 34. Justice Albright concurred to emphasize that residency may be taken into consideration along with other factors in a forum non conveniens context, but that

---

[1]The court also held that, under state law, venue was proper as to petitioner Crown because "once venue is proper for one defendant, it is proper for all other defendants subject to process." Jefferds App. 22-25. Crown has not sought this Court's review of this state-law holding.

it should not be used as a "categorical ground requiring" dismissal. *Id.* 43. Justice Maynard dissented. *Id.* 26.

REASONS FOR DENYING THE WRIT

Review is unwarranted for four reasons. First, the court lacks jurisdiction because the state court decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a). Second, the decision below rests on independent state grounds. Third, there is no conflict among the state courts regarding the question presented here. Finally, the decision below is not inconsistent with this Court's jurisprudence.

A. This Court Lacks Jurisdiction To Review The Non-final Decision Below.

This Court's review of state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the ruling of the West Virginia Supreme Court of Appeals reversed the trial court's dismissal of the case and remanded the case for further proceedings. Jefferds App. 25. Thus, the decision below is not a "final judgment" within the meaning of § 1257.

This Court has identified four exceptions to § 1257's finality requirement. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). As to the first three, this Court recognizes exceptions where (1) "the federal issue is conclusive or the outcome of further proceedings preordained," (2) the federal issue "will survive and require decision regardless of the outcome of further state court proceedings," and (3) "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 479-81; *see also Jefferson v. City of Tarrant*, 52 U.S. 75, 82 (1997). As to these three categories, the judgment involved here does not even arguably apply. If

Petitioners prevail in the trial court on remand, the question presented will no longer require decision. Thus, as in *Jefferson v. City of Tarrant*, "[t]he outcome of those further proceedings could moot the federal question" presented here. *Id.* at 78. On the other hand, if Petitioners do not prevail on remand, they "will be free to seek [Supreme Court] review when the state-court proceedings reach an end." *Id.*

The fourth *Cox Broadcasting* exception applies only when two requirements are met. First, the state court judgment must represent the final word within the state court system on a federal issue, "with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Cox Broadcasting*, 420 U.S. at 482-83.

For two reasons, this category is also inapplicable here. First, reversal of the state court decision below would not preclude further litigation on Mr. Morris's claims. As the state supreme court recognized, "it seems clear that [Mr. Morris's] Second Amended complaint does sufficiently allege that a 'substantial' portion of the acts or omissions giving rise to [his] claims occurred in West Virginia." *See* Jefferds App. 11-12 n.4. If the allegations of that complaint are correct, then venue is proper under § 56-1-1(c), regardless of the answer to the question presented in the petitions. *See also id.* 31, 35 (Benjamin, J., concurring) (case should be remanded to resolve factual question whether substantial part of acts or omissions giving rise to the claim occurred in West Virginia). Moreover, as concurring Justice Benjamin observed below, venue in this

case would also be proper under a different provision of the West Virginia Code, § 56-1-1(a), which provides for venue in the West Virginia county where the chief officer of a defendant-corporation resides. Jefferds App. 34; *see id.* at 19 (majority opinion, noting that Petitioners' argument contravenes W. Va. Code § 56-1-19a)).

Second, "refusal immediately to review the state-court decision" presents no risk of "seriously erod[ing] federal policy." No federal policy precludes West Virginia, or any state, from giving its venue statute the reading adopted by the court below. Indeed, Petitioners do not suggest—nor could they—that West Virginia's decision allowing a non-resident to sue a West Virginia resident in West Virginia state court runs afoul of any federal constitutional or statutory right or privilege. Defining the scope of § 56-1-1(c) is well within the province of the West Virginia Supreme Court of Appeals. Because there is no conceivable argument that the scope of that statute, as articulated in the opinion below, violates any federal policy, the fourth *Cox Broadcasting* exception does not confer jurisdiction on this Court here. *See Flynt v. Ohio*, 451 U.S. 619, 621 (1981) ("there is no identifiable federal policy that will suffer if the state . . . proceeding goes forward" in case presenting Equal Protection Clause question). *Compare Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (holding that to allow litigation to go forward where parties had contracted for arbitration might erode federal policy embodied in Federal Arbitration Act); *Belknap v. Hale*, 463 U.S. 491, 497 n.5 (1983) (holding that to allow case to go forward would risk eroding federal policy requiring matter at issue to be decided by NLRB, not by state courts); *Cox Broadcasting*, 420 U.S. at 485-87 (holding that delaying review would leave important question regarding freedom of press in "uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press").

In short, because this case does not fit any exception to § 1257's final judgment requirement, this Court lacks jurisdiction to review the decision below.

B. The West Virginia Supreme Court of Appeals Articulated Independent State Grounds For Its Decision.

In this case, the West Virginia Supreme Court of Appeals was asked to construe a state venue law, W. Va. Code § 56-1-1(c). The court held that, because petitioner Jefferds is a West Virginia corporation, "the provisions of W. Va. Code § 56-1-1(c) (2003) do not apply to Morris' suit against Jefferds." Jefferds App. 21.

In choosing to give the West Virginia venue statute a narrow reading, the state court started by discussing its concerns about whether Petitioners' reading of the state law was "constitutionally permissible." It then explained that, "[a]dditionally," Petitioners' reading "would contravene established West Virginia law, including other provisions of W. Va. Code § 56-1-1." Jefferds App. 19 (citing W. Va. Code 56-1-1(a)); *see also id.* 34 (Benjamin, J., concurring). Section 56-1-1(a) provides, in pertinent part, that "venue lies against a domestic corporation doing business in this State wherein its principle office is located, or where its president or principal officer resides." The state supreme court's reading of W. Va. Code § 56-1-1(a), which provides an independent basis for the decision below, presents no question appropriate for this Court's review. Therefore, the petition should be denied.

C. No Conflict Exists Among The State High Courts On The Issue Decided Below.

Below, the court rejected a reading of a state venue statute that would "categorically immunize a West Virginia

defendant" from suit in West Virginia by a nonresident. Jefferds App. 19. Attempting to fashion a conflict worthy of this Court's review, both Petitioners cite cases from various state courts addressing the relationship between the Privileges and Immunities Clause and forum non conveniens doctrine and venue statutes. *See* Jefferds Pet. 18-24; Crown Pet. 12-15. These cases do not conflict with the decision below.

1. Petitioners' reliance on forum non conveniens cases is misplaced.

Unlike the instant case, the majority of the cases cited by Petitioners do not involve venue statutes. Rather, they address the balance of factors that justify discretionary dismissal under the common-law doctrine of forum non conveniens. None of these cases conflicts with the decision below, which considers whether a state statute imposes a categorical bar on suit by out-of-state plaintiffs against in-state defendants.

For example, in *Gore v. United States Steel Corp.*, 104 A.2d 670 (N.J. 1954), the New Jersey court construed the forum non conveniens doctrine "not [to] turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice." *Id.* at 675-76. Thus, the court held that an action by or against a nonresident will not "ordinarily" be dismissed, but "only in those exceptional cases where a weighing of all of the many relevant factors" establishes that another forum will be more convenient and better serve the ends of justice. *Id.* at 676. Similarly, in *Mooney v. Denver & Rio Grande Western Railroad Co.*, 221 P.2d 628, 647 (Utah 1950), the court stated: "Granting discretionary power in the trial court to dismiss the cause for reasons of inconvenience, the power should only be exercised in exceptional circumstances and when an adequate showing has been made that the interests of justice require a

trial in a more convenient forum." The court reversed a trial court's forum non conveniens dismissal and remanded for fuller consideration of the facts concerning the convenience of witnesses, costs, the convenience of the court, and the condition of the court calendar in the alternate jurisdiction. *Id.* at 648-49. Thus, the forum non conveniens cases do not pose the question, decided below, whether a state venue statute may impose a strict rule requiring dismissal based on the presence or absence of a specific factor.

Petitioner Crown suggests that the decision below generally rejects the notion of forum non conveniens and runs counter to decisions that apply forum non conveniens doctrine. *See* Crown Pet. 14. That suggestion is wrong. The decision below addresses only the narrow question whether a state statute *requires* dismissal of an action against a state resident when the plaintiff is a nonresident. The court held that West Virginia's venue statutes do not authorize a "categorical" dismissal of such an action. The decision neither states nor implies that forum non conveniens cannot be applied in appropriate circumstances. Indeed, the concurrence of Justice Albright (who also joined the majority opinion in full) emphasizes that nothing in the court's opinion suggests that forum non conveniens may not be applied in appropriate cases to dismiss suits by nonresidents, precisely because forum non conveniens—unlike a categorical venue statute—does not erect a classification that discriminates solely on the basis of state citizenship. Rather, the focus of forum non conveniens is on the convenience of parties, witnesses, and courts, and it may result in the dismissal even of claims brought by residents of a state. Jefferds App. 43. Nothing in the majority opinion is to the contrary, and the contention that the opinion conflicts with decisions upholding the application of forum non conveniens doctrine is therefore unwarranted.

Most of the forum non conveniens cases cited by Petitioners are also irrelevant because they involve cases filed by nonresident plaintiffs against nonresident defendants. All but two of the forum non conveniens cases cited, *Gore*, 104 A.2d 670, and *Westerby v. Johns-Manville Corp.*, 32 Pa. D. & C.3d 164 (Pa. Com. Pl. 1982), fall into this category. Asserting the discretionary power to dismiss cases on convenience grounds where the defendant is not a resident of the forum state is a far cry from imposing a mandatory prohibition on suits by nonresident plaintiffs against resident defendants. Indeed, the holdings in *Harvey v. Eastman Kodak Co.*, 610 S.W.2d 582 (Ark. 1981), and *Grovey v. Washington National Insurance Co.*, 119 S.W.2d 503 (Ark. 1938) (both cited in Jefferds Pet. 24), are expressly limited to actions "between nonresidents." *Harvey*, 610 S.W.2d at 585; *see Grovey*, 119 S.W.2d at 504. *Grovey* even distinguishes a situation involving resident defendants. *Id.* at 506.

Aside from *Gore*, discussed above, the only other cited forum non conveniens case involving a resident defendant is from a state trial court in Pennsylvania, *Westerby v. Johns-Manville Corp.*, 32 Pa. D. & C.3d 164 (Pa. Com. Pl. 1982). *Westerby* involved one in-state and several foreign corporate defendants. The trial court held that "Pennsylvania law" did not prohibit dismissal based on forum non conveniens where a Pennsylvania corporation is a defendant. *Id.* at 178. The court explained that flexibility was an important part of forum non conveniens doctrine, which in Pennsylvania derives from case law, not statute. *Id. See also Walker v. Ohio River Co.*, 205 A.2d 43, 46 (Pa. 1964) (Pennsylvania Supreme Court reversing forum non conveniens dismissal, largely because defendant did business in and had principal office in the state). The West Virginia Supreme Court's decision does not conflict with the analysis of the trial court in *Westerby*. Rather, the decision

below expressly rejects Petitioners' reading of West Va. Code § 56-1-1(c) because, rather than allowing the state courts flexibility to balance factors, their reading would treat Mr. Morris's residency as a "categorical bar to his bringing suit in West Virginia against" the resident defendant Jefferds. *See* Jefferds App. 20-21; *id.* 43 (Albright, J., concurring) (permissible to take residency "into account," but impermissible to treat residency as a "*categorical* ground" requiring dismissal without regard to other factors that may be relevant).

2. The cases Petitioners cite involving venue statutes do not conflict with the judgment below.

The petitions cite only two cases involving venue statutes that discriminate against filings by nonresidents: *Rosenthal v. Unarco Industries*, 297 S.E.2d 638 (S.C. 1982); and *Loftus v. Pennsylvania Railroad Co.*, 140 N.E. 94 (Ohio 1923). These cases present no conflict over the Privileges and Immunities Clause that requires resolution by this Court. Indeed, *Rosenthal* does not even discuss the Privileges and Immunities Clause and relies exclusively on South Carolina case law.

Moreover, neither of the two cases involved resident defendants. This distinction is critical because a flat prohibition on a suit by a nonresident against a resident is obviously a much more burdensome discrimination against nonresidents and a much more naked preference for state citizens than a rule permitting dismissal of suits entirely between nonresidents. Suing where a defendant resides is usually the most dependable way of ensuring jurisdiction over the defendant, and a rule prohibiting nonresident plaintiffs from suing state residents is a significant impairment of plaintiffs' access to the courts. *See also Gober v. Federal Life Ins. Co.*, 237 N.W. 32, 33 (Mich.

1931) (although Michigan venue statute seems to restrict suits against nonresidents, "[i]f defendant were a domestic corporation, there would be no doubt of plaintiff's right to sue in this state on her cause of action").

In fact, although both Petitioners rely on *Loftus*, which involved a nonresident defendant, the Ohio Supreme Court later considered a case brought against both a New Jersey corporation doing business in the Ohio county where suit was brought and a railroad company that did not do business in that county. *See Baltimore & Ohio R.R. Co. v. Ballie*, 148 N.E. 233 (Ohio 1925). In *Ballie*, the Ohio court stated that, "admittedly," the case could be maintained against the company that did business in the county. Thus, the decisions of the Ohio Supreme Court are not inconsistent with the holding of the West Virginia court below.

Petitioners also cite *Owens Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999), which concerns a state statute. However, the portion of the opinion on which Petitioners rely does not address a categorical venue statute. Rather, it addresses a forum non conveniens provision that provides for discretionary dismissal based on consideration of a variety of factors. *Id.* at 568 (discussing Tex. Civil Prac. & Rems. Code § 71.051), *cited in* Jefferds Pet. 19-21; Crown Pet. 13. In another part of the opinion, *Owens Corning* discusses a state statute (since repealed) requiring dismissal of certain asbestos claims filed in Texas by nonresidents. Claims dismissed under that provision, however, could be refiled in Texas. *See Owens Corning*, 997 S.W.2d at 580.

D. The Decision Below Is Consistent With Supreme Court Jurisprudence.

Petitioners, focusing on *Douglas v. New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377, 387 (1929), and

Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U.S. 1 (1950), argue that the decision below is wrong under this Court's precedents. Both *Douglas* and *Mayfield* held that application of forum non conveniens to dismiss the case did not contravene the Privileges and Immunities Clause under the facts presented. As is true with regard to most of the state cases cited in the petitions, both of these cases considered dismissal under forum non conveniens doctrine, not a categorical discrimination under a venue statute. In addition, and again as is true with regard to nearly all of the state cases cited, both *Douglas* and *Mayfield* involved out-of-state defendants. *Douglas*, 279 U.S. at 385; *Mayfield*, 340 U.S. at 2-3. Thus, the specific issue decided by the West Virginia court in this case was not presented in those cases. In addition, in contrast to this case, no substantial part of the acts or omissions giving rise to the plaintiff's cause of action occurred in the state where either *Douglas* or *Mayfield* was brought.

Petitioners point to language from these older cases stating that, to comply with the Privileges and Immunities Clause, states may not discriminate between citizens and non-citizens, but they may discriminate between residents and non-residents. The West Virginia Supreme Court was aware of these cases, *see* Jefferds App. 26, 28 (dissent), but based its analysis on this Court's more recent view that "resident" and "citizen" are "essentially interchangeable." *Id.* 8 (quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975)); *see also id.* (citing *United Bldg. & Constr. Trades Council v. Mayor & Council of City of Camden*, 465 U.S. 208, 216 (1984)). The decision below is fully consistent with the Court's recent cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

John Cooper
Counsel of Record
Cooper, Preston & Douglas
333 2nd Street
Parsons, WV 26287
(304) 478-4600

November 2006